

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CYNTHIA A. MILLER,)
) No. CV-09-21-JPH
Plaintiff,)
) ORDER GRANTING DEFENDANT'S
v.) MOTION FOR SUMMARY JUDGMENT
)
MICHAEL J. ASTRUE, Commissioner)
of Social Security,)
)
Defendant.)
)
)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on August 28, 2009. (Ct. Rec. 14, 16). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) On August 7, 2009, Plaintiff filed a reply. (Ct. Rec. 18.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

JURISDICTION

Plaintiff filed an application for supplemental security income (SSI) on May 3, 2006, alleging onset as of the application

1 date. (Tr. 17, 110-115.) The application was denied initially and
2 on reconsideration. (Tr. 65-66, 73-76.) Administrative Law Judge
3 (ALJ) Hayward C. Reed held a hearing on February 20, 2008. (Tr.
4 27-55.) Plaintiff, represented by counsel, and vocational expert
5 Anne Aastum testified. On June 11, 2008, the ALJ issued a
6 decision finding plaintiff is not disabled. (Tr. 23.) The Appeals
7 Council denied a request for review on December 12, 2008. (Tr. 4-
8 8.) Therefore, the ALJ's decision became the final decision of
9 the Commissioner, which is appealable to the district court
10 pursuant to 42 U.S.C.
11 § 405(g). Plaintiff filed this action for judicial review
12 pursuant to 42 U.S.C. § 405(g) on January 27, 2009. (Ct. Rec.
13 1,4.)

14 **STATEMENT OF FACTS**

15 The facts have been presented in the administrative hearing
16 transcript, the ALJ's decision, referred to as necessary in the
17 briefs of both plaintiff and the Commissioner, and will only be
18 summarized here.

19 Plaintiff was 20 years old at the time of filing and 21 at
20 the hearing. (Tr. 22,28.) She has a tenth grade education. (Tr.
21 30-31.) Plaintiff has never worked, lives with her mother and has
22 no income. (Tr. 22,43-44,47.) She alleges disability as of May 3,
23 2006, due to diabetes and hypothyroidism. (Tr. 65,73.)

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Social Security Act (the "Act") defines "disability"
26 as the "inability to engage in any substantial gainful activity by
27 reason of any medically determinable physical or mental impairment
28 which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than
2 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
3 Act also provides that a Plaintiff shall be determined to be under
4 a disability only if any impairments are of such severity that a
5 plaintiff is not only unable to do previous work but cannot,
6 considering plaintiff's age, education and work experiences,
7 engage in any other substantial gainful work which exists in the
8 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
9 Thus, the definition of disability consists of both medical and
10 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
11 (9th Cir. 2001).

12 The Commissioner has established a five-step sequential
13 evaluation process for determining whether a person is disabled.
14 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
15 is engaged in substantial gainful activities. If so, benefits are
16 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
17 not, the decision maker proceeds to step two, which determines
18 whether plaintiff has a medically severe impairment or combination
19 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
20 416.920(a)(4)(ii).

21 If plaintiff does not have a severe impairment or combination
22 of impairments, the disability claim is denied. If the impairment
23 is severe, the evaluation proceeds to the third step, which
24 compares plaintiff's impairment with a number of listed
25 impairments acknowledged by the Commissioner to be so severe as to
26 preclude substantial gainful activity. 20 C.F.R. §§
27 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
28 App. 1. If the impairment meets or equals one of the listed

1 impairments, plaintiff is conclusively presumed to be disabled.
2 If the impairment is not one conclusively presumed to be
3 disabling, the evaluation proceeds to the fourth step, which
4 determines whether the impairment prevents plaintiff from
5 performing work which was performed in the past. If a plaintiff
6 is able to perform previous work, that Plaintiff is deemed not
7 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
8 this step, plaintiff's residual functional capacity ("RFC")
9 assessment is considered. If plaintiff cannot perform this work,
10 the fifth and final step in the process determines whether
11 plaintiff is able to perform other work in the national economy in
12 view of plaintiff's residual functional capacity, age, education
13 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish
16 a *prima facie* case of entitlement to disability benefits.
17 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
18 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
19 met once plaintiff establishes that a physical or mental
20 impairment prevents the performance of previous work. The burden
21 then shifts, at step five, to the Commissioner to show that (1)
22 plaintiff can perform other substantial gainful activity and (2) a
23 "significant number of jobs exist in the national economy" which
24 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
25 Cir. 1984).

26 STANDARD OF REVIEW

27 Congress has provided a limited scope of judicial review of a
28 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

1 the Commissioner's decision, made through an ALJ, when the
2 determination is not based on legal error and is supported by
3 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
4 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
5 1999). "The [Commissioner's] determination that a plaintiff is
6 not disabled will be upheld if the findings of fact are supported
7 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
8 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
9 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
10 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
11 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
12 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
13 573, 576 (9th Cir. 1988). Substantial evidence "means such
14 evidence as a reasonable mind might accept as adequate to support
15 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
16 (citations omitted). "[S]uch inferences and conclusions as the
17 [Commissioner] may reasonably draw from the evidence" will also be
18 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
19 On review, the Court considers the record as a whole, not just the
20 evidence supporting the decision of the Commissioner. *Weetman v.*
21 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
22 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

23 It is the role of the trier of fact, not this Court, to
24 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
25 evidence supports more than one rational interpretation, the Court
26 may not substitute its judgment for that of the Commissioner.
27 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
28 (9th Cir. 1984). Nevertheless, a decision supported by

1 substantial evidence will still be set aside if the proper legal
2 standards were not applied in weighing the evidence and making the
3 decision. *Browner v. Secretary of Health and Human Services*, 839
4 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
5 evidence to support the administrative findings, or if there is
6 conflicting evidence that will support a finding of either
7 disability or nondisability, the finding of the Commissioner is
8 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
9 1987).

10 **ALJ'S FINDINGS**

11 The ALJ found at step one that plaintiff has not engaged in
12 substantial gainful activity since the application date of May 3,
13 2006. (Tr. 19.) At step two, ALJ Reed found plaintiff suffers
14 from diabetes mellitus and hypothyroidism, impairments which are
15 severe but do not alone or in combination meet or equal a Listed
16 impairment. (Tr. 19-20.) The ALJ assessed an RFC for less than
17 the full range of medium work and the full range of unskilled
18 light work. (Tr. 20, 48.) At step four the ALJ found plaintiff
19 had no past relevant work. (Tr. 22.) At step five, the ALJ relied
20 on the VE's testimony and found plaintiff could perform work such
21 as a mail clerk, survey worker or cashier. (Tr. 23, referring to
22 Tr. 48.) Accordingly, the ALJ found plaintiff is not disabled as
23 defined by the Social Security Act. (Tr. 23.)

24 **ISSUES**

25 Plaintiff contends the Commissioner erred as a matter of law
26 because the ALJ improperly discounted her testimony. (Ct. Rec. 15
27 at 9-12, 18 at 1-3.) The Commissioner responds that the ALJ
28 appropriately weighed plaintiff's credibility and asks the Court

1 to affirm the decision. (Ct. Rec. 17 at 6-13.)

2 **DISCUSSION**

3 **Credibility**

4 In social security proceedings, the claimant must prove the
5 existence of a physical or mental impairment by providing medical
6 evidence consisting of signs, symptoms, and laboratory findings;
7 the claimant's own statement of symptoms alone will not suffice.
8 20 C.F.R. § 416.908. The effects of all symptoms must be
9 evaluated on the basis of a medically determinable impairment
10 which can be shown to be the cause of the symptoms. 20 C.F.R. §
11 416.929. Once medical evidence of an underlying impairment has
12 been shown, medical findings are not required to support the
13 alleged severity of symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341,
14 345 (9th Cr. 1991).

15 To aid in weighing the medical evidence, the ALJ evaluated
16 plaintiff's credibility and found her less than fully credible.
17 (Tr. 21.) Credibility determinations bear on evaluations of
18 medical evidence when an ALJ is presented with conflicting medical
19 opinions or inconsistency between a claimant's subjective
20 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.
21 3d 683, 688 (9th Cir. 2005).

22 It is the province of the ALJ to make credibility
23 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
24 1995). However, the ALJ's findings must be supported by specific
25 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
26 Cir. 1990). Once the claimant produces medical evidence of an
27 underlying medical impairment, the ALJ may not discredit testimony
28 as to the severity of an impairment because it is unsupported by

1 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
2 1998). Absent affirmative evidence of malingering, the ALJ's
3 reasons for rejecting the claimant's testimony must be "clear and
4 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
5 "General findings are insufficient: rather the ALJ must identify
6 what testimony not credible and what evidence undermines the
7 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
8 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

9 The ALJ relied on several factors when he assessed
10 plaintiff's credibility: (1) inconsistent statements; (2) claimed
11 degree of impairment is unsupported by the medical record; (3)
12 activities inconsistent with the degree of impairment alleged, and
13 (4) non-compliance with taking prescribed medications. (Tr. 21.)

14 Inconsistent statements

15 The ALJ notes several inconsistencies in plaintiff's
16 statements. (Tr. 21.) She testified she could only stand for
17 about 15 to 30 minutes and "napped up to 9 hours a day." (Tr. 33-
18 36, 54.) On June 14, 2006, just a month after onset, plaintiff
19 stated she was able to work but didn't because she didn't have a
20 job. (Tr. 141.) The ALJ points out that in November of 2007,
21 plaintiff planned to return to school to get her GED "so she could
22 get a job," a statement also inconsistent with the degree of
23 claimed impairment. (Tr. 21, referring to Tr. 297." This reason
24 is clear, convincing, and fully supported by the evidence.

25 Complaints unsupported by the record

26 The ALJ notes "no treating physician has opined that the
27 claimant could not work." (Tr. 21.) Plaintiff testified her
28 doctors say she can work and "it would probably be good" for her.

1 (Tr.44-45.) After reviewing the record, medical expert (ME),
2 Steven Gerber, M.D., opined plaintiff's impairments do not meet or
3 equal a Listed impairment. He assessed an RFC for medium work
4 limited to avoiding exposure to hazardous and unprotected heights.
5 (Tr. 306-07.) Nothing in the medical record supports the degree
6 of plaintiff's claimed impairment. This reason by the ALJ is
7 clear, convincing, and fully supported by the evidence.

8 Daily activities

9 The ALJ notes plaintiff's activities are inconsistent with
10 the limitations described in her testimony. She applied for a
11 housecleaning job in early August of 2007. (Tr. 41-42, 293).
12 Plaintiff hurt her finger playing football, also in August of
13 2007. (Tr. 43, referring to Tr. 282.) The ALJ observes plaintiff
14 has described her post-onset activities as going to the library,
15 cleaning, shopping, cooking, chatting online, reading, listening
16 to music, watching movies, and hanging out with friends. (Tr. 21,
17 referring in part to Tr. 37-38; Tr. 138, 140-142.) Activities
18 inconsistent with claimed limitations diminish credibility.

19 Noncompliance with prescribed medication

20 Plaintiff has not been compliant with taking medications
21 prescribed for diabetes and hypothyroidism, leading the ALJ to
22 conclude:

23 If the claimant's condition was not severe
24 enough to motivate her to follow her treatment,
25 it is difficult to accept her assertion that it
26 is disabling.

27 (Tr. 21, referring to Tr. 34-35, 39, 41, 184-185 (without thyroid
28 medication for a year), 284, 286-287, 292.) Dr. Gerber noted the
records "document substantial non-compliance with prescribed

1 treatments." (Tr. 307.)

2 The ALJ is correct. Unexplained or inadequately explained
3 failure to seek treatment or to follow a prescribed course of
4 treatment is an appropriate factor to consider in weighing
5 credibility. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
6 1996); *Orn v. Astrue*, 495 F.3d 625, 637-639 (9th Cir. 2007). This
7 reason is clear, convincing and supported by the record.

8 The ALJ's reasons for finding plaintiff less than fully
9 credible are all clear, convincing, and fully supported by the
10 record. See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
11 2002)(proper factors include inconsistencies in plaintiff's
12 statements, inconsistencies between statements and conduct, and
13 extent of daily activities). The ALJ is responsible for reviewing
14 the evidence and resolving conflicts or ambiguities in testimony.
15 *Magallanes v. Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is
16 the role of the trier of fact, not this court, to resolve
17 conflicts in evidence. *Richardson*, 402 U.S. at 400. The court
18 has a limited role in determining whether the ALJ's decision is
19 supported by substantial evidence and may not substitute its own
20 judgment for that of the ALJ, even if it might justifiably have
21 reached a different result upon de novo review. 42 U.S.C. § 405
22 (g).

23 Because the ALJ's credibility assessment is supported by
24 clear, convincing reasons, and the reasons are fully supported by
25 the evidence, his determination is without error.

26 CONCLUSION

27 Having reviewed the record and the ALJ's conclusions, this
28 court finds that the ALJ's decision is free of legal error and

1 supported by substantial evidence..

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
6 **DENIED.**

7 The District Court Executive is directed to file this Order,
8 provide copies to counsel for Plaintiff and Defendant, enter
9 judgment in favor of Defendant, and **CLOSE** this file.

10 DATED this 28th day of September, 2009.

11 s/ James P. Hutton

12 JAMES P. HUTTON
13 UNITED STATES MAGISTRATE JUDGE
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